

In The Matter Of:
CAROLINE CASEY, ET AL. v.
NEW HAMPSHIRE SECRETARY OF STATE, ET AL

MOTION HEARING
July 30, 2019

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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CAROLINE CASEY, ET AL.,	*	
Plaintiffs,	*	
	*	
v.	*	19-cv-00149-JL
	*	July 30, 2019
NEW HAMPSHIRE SECRETARY OF STATE,	*	10:06 a.m.
ET AL.,	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Plaintiffs:	S. Amy Spencer, Esq. Shaheen & Gordon, P.A. Henry Klementowicz, Esq. Gilles Bissonnette, Esq. Julie Ebenstein, Esq. ACLU of New Hampshire
For the Government:	Office of the Attorney General Samuel Garland, Esq. Anthony Galdieri, Esq. Seth M. Zoracki, Esq.
Court Reporter:	Sharon Saalfeld, LCR, RPR, CRR Duffy & McKenna Court Reporters P. O. Box 1658 Dover, New Hampshire 03821 (800) 600-1000

P R O C E E D I N G S

THE CLERK: The Court has before it for consideration today a motion hearing in civil case number 19-cv-149-JL, Caroline Casey, et al., versus New Hampshire Secretary of State, et al.

THE COURT: Good morning, everybody.

ATTORNEYS: Good morning.

THE COURT: This is a motion to dismiss hearing based on standing and sufficiency of the complaint, some arguments as to only the individual plaintiffs, some as to the party.

And why don't counsel identify themselves for the record and we'll get under way.

MR. GALDIERI: Anthony Galdieri from the New Hampshire Attorney General's office, for the defendants.

THE COURT: Good morning.

MR. GARLAND: Sam Garland from the AG's office for the defendants.

MR. ZORACKI: Seth Zoracki, also for the defendants, from the New Hampshire Attorney General's office.

MR. KLEMENTOWICZ: Henry Klementowicz from the American Civil Liberties Union of New Hampshire on behalf of Caroline Casey and Maggie Flaherty.

1 MS. SPENCER: Amy Spencer from Shaheen and
2 Gordon on behalf of the New Hampshire Democratic
3 Party, Your Honor.

4 THE COURT: Good morning.

5 MR. BISSENETTE: Good morning, Your Honor.
6 Gilles Bissonnette of the ACLU on behalf of Caroline
7 Casey and Maggie Flaherty.

8 MS. EBENSTEIN: Good morning, Your Honor.
9 Julie Ebenstein on behalf of the plaintiffs.

10 THE COURT: Thank you. You're on behalf of
11 Casey and Flaherty?

12 MR. GALDIERI: Yes, Your Honor.

13 THE COURT: Thanks. Okay. AGO, your motion.

14 MR. GARLAND: Thanks, Your Honor. So I will be
15 arguing the standing portion of our motion and then
16 Attorney Zoracki is going to go after that.

17 So unless you have any questions, I was just
18 going to present the arguments in the order we
19 presented them in the motion, and proceed from
20 there.

21 We started with Ms. Casey and Ms. Flaherty.
22 The argument is that they do not have standing to
23 bring this action as individual plaintiffs because
24 they have not alleged an injury in fact as required
25 for Article III standing. That injury in fact must

1 be concrete, particularized. It must affect the
2 plaintiffs in a personal and individualized way. In
3 their complaint, the individual plaintiffs reference
4 repeatedly --

5 THE COURT: They don't own vehicles, right?

6 MR. GARLAND: Correct, Your Honor.

7 THE COURT: So registration is really off the
8 table. It's about licensing.

9 MR. GARLAND: Exactly.

10 THE COURT: Everybody agree with that?

11 MR. KLEMENTOWICZ: Yes.

12 THE COURT: Okay. Good.

13 MR. GARLAND: Absolutely. And so the licensing
14 requirement is under RSA 263:35. That says any
15 nonresident driver of a motor vehicle who becomes a
16 bona fide resident has to get a license within 60
17 days of becoming a resident. That's in the motor
18 vehicle code which has its own statutory definition
19 section. It defines "driver." It says that, "A
20 driver is a person who drives or is in actual
21 physical control of a motor vehicle." It defines
22 "drive." It says, "In all its moods and tenses,
23 shall mean to operate or be in actual physical
24 control of a motor vehicle." And so as we presented
25 in our motion, it's someone who is actually driving

1 within the state.

2 There is no allegation in the individual
3 plaintiffs complaints that they are driving in the
4 state, that they have driven within the state, that
5 they intend to drive within the state in the
6 foreseeable future.

7 THE COURT: What driver in the world only
8 drives in some states?

9 MR. GARLAND: Well, I think, Your Honor, a
10 college student might. I mean, a college student
11 who goes to --

12 THE COURT: A student might, but a college
13 student also might drive in the state, right?

14 MR. GARLAND: Conceivably, Your Honor, sure.
15 But I think if they want to have standing to bring a
16 federal lawsuit under Article III, they should
17 allege that they drive within the state, or at least
18 --

19 THE COURT: Somebody's going to pull designated
20 driver duty at some point. Everybody, right? Every
21 college student is going to be a designated driver
22 some night.

23 MR. GARLAND: I think that's conceivable as
24 well, Your Honor, but I'm not sure that that's
25 beyond the speculative level, right? It has to be

1 concrete and particularized. They have to actually
2 say that -- something more than that. And that's
3 not in their complaint.

4 THE COURT: True. It's not -- it's true that
5 the complaint does not allege, "I drive in New
6 Hampshire and I" -- that's true. I'm just not sure.
7 You're going to throw out a lawsuit because someone
8 is a driver, indisputably a driver, right, but they
9 haven't alleged that they're going to drive within,
10 necessarily within the borders of our state? That's
11 not a fair inference? A driver, a complaint stated
12 in federal litigation.

13 MR. GARLAND: I think it's -- our position is
14 that it's a speculative inference to draw at this
15 point. And obviously, 12(b) motions can't be
16 defeated on pure speculation, and so that's the
17 position we've taken with respect to that argument.

18 The other argument that they've raised in their
19 objection to the motion to dismiss is that basically
20 what 1264, HB 1264 does is it creates a requirement
21 either that you abstain from voting or that you
22 abstain from driving within the state. I think
23 that's false equivalency. There is a third option.
24 There are New Hampshire residents who may become
25 residents for voting purposes who do not drive

1 within the state. And under a plain reading of the
2 statute and the definitions, those residents
3 wouldn't be under any obligation to get a driver's
4 license.

5 So the way that it's been presented in the
6 complaint, that it's an either-or decision: You
7 abstain from voting or you abstain from driving. I
8 guess you get a driver's license, which is the harm
9 they've alleged that'll be inflicted upon them.
10 That doesn't seem to be correct under a plain
11 reading of the statute.

12 So as the complaint is alleged right now,
13 without any affirmative allegation that they're
14 going to actually drive within the state, they could
15 very well fit within that third group of people. I
16 mean, you can conceive of college students, you can
17 conceive of senior citizens, just to name a few,
18 that would be people who vote within the state, or
19 are registered to vote within the state, who have no
20 intention of driving within the state. And under
21 the statute, that requires that it be an active --
22 you know, an active driver or an active driver
23 within the state. Those people wouldn't be
24 obligated to get a driver's license. So I think
25 something more is necessary to allege an injury in

1 fact here.

2 THE COURT: So you're saying college students
3 who register to vote but have no intention of
4 driving in the state --

5 MR. GARLAND: Correct.

6 THE COURT: -- can vote without any impediment?

7 MR. GARLAND: Yeah, no impediment, is our
8 position.

9 THE COURT: Do you agree with that?

10 MR. KLEMENTOWICZ: So, I think, Your Honor --

11 THE COURT: Do you agree with that?

12 MR. KLEMENTOWICZ: If they abstain from driving
13 under all circumstances, I agree that the law only
14 requires one to buy a New Hampshire driver's license
15 if one is going to drive, but I would frame it in
16 the context of you would have to voluntarily
17 relinquish your rights to drive in the state
18 indefinitely.

19 THE COURT: Do you agree with that?

20 MR. GARLAND: I don't think so, Your Honor. I
21 think there's still the third group of people. You
22 don't -- not everybody wants to drive. Not
23 everybody has an intention of driving.

24 THE COURT: So college students who have
25 licenses in the Commonwealth can be in that third

1 group of people?

2 MR. GARLAND: I believe so. If they're within
3 the state and they have no intention of driving
4 within the state, Your Honor.

5 I think, first, Hanover, you know, I mean, they
6 characterize Hanover as a very rural town where you
7 absolutely have to drive. I don't think that's a
8 fair characterization. Hanover is a county that has
9 plenty of things within the town, within the campus
10 and within the town around it that a person could
11 very happily exist there without ever needing to
12 drive anywhere, who could be picked up by their
13 parents and dropped off by their parents, or
14 carpooled home or something along those lines, and
15 so I think it's certainly conceivable.

16 THE COURT: Well, then we would helicopter into
17 a (inaudible) modern parents would not count.
18 Here's the thing. I think this argument, it's
19 interesting. I think where it gets fully developed,
20 though, isn't at standing. It's at merits. I
21 understand how it's a standing argument, I do, and
22 how one might view it that way.

23 So college students who retain their licensure
24 in some other state don't suffer any impingement,
25 infringement on their right to vote under the

1 statutory regime. That's what you're saying?

2 MR. GARLAND: If they don't intend to drive
3 within New Hampshire while they're here, correct.
4 And I think that's the allegation that's missing
5 from the complaint.

6 THE COURT: They don't intend to -- yeah. I
7 mean, honestly, you know, I think this goes to your
8 argument. I wouldn't be surprised if the majority,
9 over half of Dartmouth and UNH students, never drive
10 a vehicle in New Hampshire in their four years here.
11 But a lot also do. I don't know if it's an
12 unreasonable inference to suggest that a licensed --
13 a licensed driver, someone who is licensed
14 somewhere, will drive and intend to drive in New
15 Hampshire.

16 But, okay, I understand your argument.

17 MR. GARLAND: Our position is it's an
18 allegation that should be there, if that's the
19 intention, Your Honor.

20 THE COURT: But see, look, they've said, "Well,
21 Judge, if you don't think our complaint is
22 sufficiently -- sufficiently established a standing,
23 we'll amend it." I'm not -- I've never been a fan
24 of the "if you're going to dismiss my complaint,
25 I'll amend it" argument. I don't allow it. I'm not

1 sure if it's necessary here. It just doesn't seem
2 like an unreasonable inference at this stage of the
3 litigation that licensed drivers, drivers licensed
4 in other states intend to drive in the State of New
5 Hampshire while they're here for a four-year --
6 well, roughly four-year period, or any period of
7 collegiate study. Anyway, go ahead.

8 MR. GARLAND: I'll proceed on to the Secretary
9 of State. And so both the individual of the
10 plaintiffs, if you infer that there's an actual
11 injury, in fact, alleged, and the Democratic Party,
12 we feel do not have standing to allege -- to bring
13 these claims against the Secretary of State. And
14 that's under the second and third requirements
15 standing, that the injury be fairly traceable to the
16 challenged conduct of the defendant, that is likely
17 to be redressed by a favorable judicial decision.
18 That requires a sufficient direct causal connection,
19 cannot be overly attenuated, and that's what we
20 think exists here, Your Honor.

21 THE COURT: I don't understand -- you know
22 what, I understand your arguments. I'm not sure I
23 agree with them. I definitely understand them. But
24 I don't see the point of what does it get you if the
25 Secretary of State is dismissed from the case? If I

1 find standing and the Secretary of State is
2 dismissed from the case on a traceability argument,
3 I mean, I don't understand what difference it makes
4 if the Secretary of State is a defendant in the case
5 or not. The case will still proceed. It's against
6 the government, in essence, of the State of New
7 Hampshire.

8 Why -- is your argument about the Secretary of
9 State, which seems to me, just a total -- sort of an
10 illusory argument, a red herring. What does it get
11 you? Suppose I said, "I find standing but yes, Bill
12 Gardner's dismissed." Is it a discovery thing?

13 MR. GARLAND: Yes, Your Honor. I think that's
14 probably the most direct way that it matters. I
15 mean, it could impact the ways through which the
16 plaintiffs could get discovery in this case. What
17 we are seeking --

18 THE COURT: So if I grant that, what I buy
19 myself is a lot of discovery litigation. When they
20 want to depose Bill Gardner, you would object. Is
21 that the way that goes? Because that's not going to
22 happen.

23 MR. GARLAND: We would certainly work with
24 opposing counsel, Your Honor, to work through any
25 disputes we have over that one.

1 THE COURT: You say that, but you also just
2 told me the reason you want Gardner dismissed from
3 the case for discovery. So it doesn't sounds like
4 you want to work with him. It sounds like you want
5 to block him on that issue.

6 I mean, if I told you right now they're going
7 to get full-blown discovery anyway because it's
8 clear what the motivation of this statute was -- and
9 it is, clear, right? It's not unclear.

10 I think you're right. This is a motor vehicle
11 statute amendment, clearly, but it wasn't motivated
12 by -- it wasn't motivated by any intention to
13 regulate the rules of the road, right?

14 MR. GARLAND: So I think the Secretary of
15 States are our client, Your Honor. We have to raise
16 whatever arguments we can raise on behalf of our
17 clients. We have a viable legal argument as to why
18 he should not be a defendant in this case, and so I
19 think just from that standpoint, we're obligated to
20 raise it.

21 I do think the way it could most directly
22 impact this case is from a discovery standpoint.
23 That's certainly -- I think regardless of whether or
24 not you said there were full -- there would be
25 full-blown discovery, we would have to raise this

1 argument on behalf of our client.

2 THE COURT: You'd have to because -- when you
3 say he's your client, he's not a private citizen who
4 is paying his legal bills and you need to eliminate
5 the burdens of litigation. He's the Secretary of
6 State, and you're going to be here anyway, right?

7 MR. GARLAND: But he is named in a federal
8 lawsuit, Your Honor. I mean, that --

9 THE COURT: He's named in his official
10 capacity.

11 MR. GARLAND: True. Yes. Yeah.

12 THE COURT: It could be anybody, right? I
13 mean, the argument that "he's our client, we must
14 protect him," his life isn't going to change except
15 he might show up for a deposition and produce some
16 discovery. This whole argument about -- because you
17 haven't alleged similar arguments about the Attorney
18 General or any other state official. It's just the
19 Secretary of State. Any relief -- any equitable
20 relief the Court can order, the State's going to
21 have to implement, whether it's Secretary of State
22 Gardner doing it or some other state official,
23 right?

24 Is there any real -- is there any real upshot
25 in this? Any real practical significance outside of

1 this litigation and what I allow for discovery? Is
2 there any practical significance whatsoever to
3 dismissing the Secretary of State from the case, or
4 not?

5 MR. GARLAND: I'm going to have to think about
6 that, Your Honor.

7 THE COURT: I'll take that as a "no" until
8 you --

9 MR. GARLAND: Okay. Fair enough.

10 THE COURT: I don't mean that to be flip.

11 MR. GARLAND: Right.

12 THE COURT: I'm just saying because I can't
13 think of any. If somebody can at counsel table,
14 chime in, because -- please.

15 MR. GALDIERI: Your Honor, there's a difference
16 between the Attorney General and the Secretary of
17 State. Attorney General has to implement and
18 enforce the law. 1264 amends statutory definitions.
19 And he would instruct agencies on the interpretation
20 of those, how they flow into other statutes, and he
21 would be an official who could be sued in this
22 case.

23 THE COURT: I'm with you.

24 MR. GALDIERI: And a judgment could be enforced
25 against him. The Secretary of State doesn't enforce

1 this law. He doesn't implement this law. He has
2 nothing to do with this law.

3 THE COURT: Wasn't he going to share -- isn't
4 he going to share voter registration information to
5 facilitate the implementation of this law?

6 MR. GALDIERI: I don't understand that to be
7 the case. What he maintains is a voter registration
8 database that's --

9 THE COURT: How is the State going to ensure
10 that those who register to vote also follow through
11 and change their driver's licenses or register their
12 vehicles, unless the Secretary of State shares
13 information with other executive branch agencies?

14 MR. GALDIERI: I do not believe -- I do not
15 believe the Secretary of State will be sharing that
16 information to enforce this law.

17 THE COURT: Then how is the statute going to be
18 enforced? How is it going to work?

19 MR. GALDIERI: Well, that's a question for the
20 Department of Safety, the director of motor
21 vehicles.

22 THE COURT: Aren't you here representing the
23 state government?

24 MR. GALDIERI: We are here representing the
25 Attorney General and the Secretary of State. The

1 Department of Motor Vehicles hasn't been sued.
2 Their statutes have not been challenged as
3 unconstitutional.

4 THE COURT: Their statutes?

5 MR. GALDIERI: Well, the statutes that they
6 interpret, the statutes that they issue their
7 regulations under to determine how they operate.

8 THE COURT: You're sitting here telling me
9 today that we have a statute that connects voter
10 registration with vehicle registration and driver
11 licensure, and the information won't be shared
12 between the state agencies? I ask you again, then.
13 And I know that I guess other departments and
14 agencies haven't been sued, but I expect the
15 Attorney General's office to be -- to explain to me
16 how the state laws are going to work, all right?

17 I started at this by trying to ask what
18 difference it makes whether the Secretary of State
19 is in the case? You couldn't answer it. So now
20 you're telling me, as a half answer, what the AG's
21 role is, the Attorney General, which I think is a
22 perfectly accurate answer that you provided, but it
23 doesn't answer the question about how voter
24 registration information, all right, which triggers
25 an obligation in other executive branch agencies to

1 register a vehicle and to apply for a license.

2 How could it possibly work without the
3 Secretary of State sharing that information, or at
4 least making it available, allowing access by other
5 state agencies?

6 MR. GALDIERI: Well, the voter registration
7 database is highly confidential. There are a few
8 provisions in the statute that allows it to be
9 shared for very specific reasons, but it's otherwise
10 privileged from being sought in litigation, and it
11 cannot be shared with other agencies and other
12 individuals in the state. That's RSA 654:45.

13 THE COURT: Sure.

14 MR. GALDIERI: My recollection is unclear as I
15 stand here now as to whether there's something in
16 there about the Department of Motor Vehicles, but I
17 don't understand that to be the case, that the
18 Secretary of State is going to be sharing
19 information with the Department of Motor Vehicles.

20 THE COURT: Then how does the statutory regime
21 work?

22 MR. GALDIERI: Well, the statutory regime is
23 not connected to voting. It has nothing to do --
24 there's no connection in the statutory language that
25 says if you get a license --

1 THE COURT: Sure.

2 MR. GALDIERI: If you register to vote, you
3 have to get a license. That connection is not
4 there.

5 THE COURT: Yeah. I think that's how I read
6 it, too. I'm just -- which might be -- that might
7 be exactly what ends up carrying the day at the end
8 of the day here, because I'm not sure I see the
9 burden.

10 But at the standing stage, right, when
11 someone's alleged injury in fact, I mean, they have
12 alleged information sharing, right, in their
13 complaint, and I don't know how else the statutory
14 regime would work without information sharing.
15 Unless someone -- unless information is shared
16 between these agencies, I'm not sure how one could
17 ever monitor the residency requirement to vote.
18 Does anyone have an answer for that?

19 MR. GALDIERI: Well, the residency requirement
20 is checked at voter registration to prove your
21 qualifications, and if you're a resident, you get to
22 register to vote.

23 THE COURT: Yeah.

24 MR. GALDIERI: The licensure requirement is
25 separate and it's connected to your view of when you

1 are a resident of this state.

2 THE COURT: But if it turns out that I admit a
3 declaration that subjects me to -- there is a
4 penalty for declaring myself a resident yet not
5 obtaining a license and registering my vehicle.
6 There is a penalty for that, right?

7 MR. GALDIERI: There is a penalty in the motor
8 vehicle statutes.

9 THE COURT: How would one go about -- let's
10 assume in the motor vehicle statute I was prosecuted
11 for not having a -- for not having a license or for
12 having a vehicle not registered in New Hampshire
13 when it should have been. I'll admit, I'm not sure
14 how that would come about. But this scheme would
15 expose one to that, wouldn't it? If I've declared
16 my residency to vote, yet I haven't undertaken the
17 obligations that come with residency, and I was
18 prosecuted for it, right, couldn't my registration
19 to vote be evidence against me in that criminal case
20 for having declared residency yet not obtained a
21 license or registered my vehicle?

22 MR. GALDIERI: It could be evidence. It
23 doesn't mean that the day that you registered to
24 vote, you were a resident of the state. It could be
25 90 days earlier you were a resident of the state

1 based on all your actions and --

2 THE COURT: But it could be evidence. How
3 could it be presented if there's no information
4 sharing? Where is the prosecutorial authority to
5 get -- we can't both talk at the same time.

6 MR. GALDIERI: Sorry.

7 THE COURT: That's okay. If it can be
8 evidence, it seems to me there must be availability
9 of that registration information, right? It's got
10 to be available to state prosecutor -- state
11 prosecuting authorities somehow.

12 MR. GALDIERI: They would go to -- they could
13 go to the town clerk's office and subpoena the
14 documents.

15 THE COURT: The voter registration boards?

16 MR. GALDIERI: Yes. The hard copy documents.
17 They are exempt from 91(a) but they aren't exempt
18 from subpoena power.

19 THE COURT: Okay.

20 MR. GARLAND: I think what I'd add to that,
21 Your Honor, is that you're going to hear quite a
22 bit, I think, later on from both sides about whether
23 this is actually a legend law, but one thing that no
24 one seems to dispute on the other side is that this
25 doesn't change the eligibility to vote. It doesn't

1 change the requirements for registering to vote. It
2 doesn't change how you cast the ballot. It's just
3 things that may happen after the fact. And it's
4 "may," still, under these circumstances, collateral
5 consequences.

6 So the Secretary, nothing changes about the
7 Secretary's role in this process. And so if there
8 was information sharing about someone who should
9 have been -- become a resident and registering to
10 vote was evidence of that even prior to this law
11 going into effect -- and I understand it changes the
12 dynamic slightly but that could still be evidence
13 prior to this law going into effect.

14 The Secretary's role is the same. There's
15 nothing about 1264 that changes anything about that.
16 So I think that's the point I think that I would add
17 to this is that the Secretary's role is unchanged by
18 virtue of 1264.

19 They could try to get around it, I think, by
20 focusing on advocacy on behalf of this law. I don't
21 think that has any bearing on whether he can enforce
22 this law or he has any role, and so I don't know
23 that that argument has much traction.

24 The other thing --

25 THE COURT: Just goes to motivation. It

1 doesn't go to anything but motivation, but it goes
2 to motivation.

3 MR. GARLAND: From a standing standpoint. I'm
4 not sure that that --

5 THE COURT: I'm not sure it matters.

6 MR. GARLAND: From a standing standpoint,
7 right? Because you have no role in how this law --
8 there would be no redressability, I don't think,
9 directed toward him, even if he had a motivation for
10 this law to go into effect. It doesn't make it more
11 likely that any authority that he has extends to --

12 THE COURT: Let me try it this way, then. The
13 Secretary of State's job is to administer the state
14 election laws, right? Right?

15 MR. GARLAND: Right. Yes, Your Honor.

16 THE COURT: Does that involve in any way,
17 shape, or form, managing, compiling, maintaining,
18 distributing -- any of the above, any one of the
19 above -- voter registration information? Or is that
20 all maintained in the state -- in the town, the town
21 halls and the town offices?

22 MR. GALDIERI: So, Your Honor, I can answer
23 that question. That information is in paper form,
24 hard copy form, at the town clerk's office. It's
25 entered into a centralized voter registration

1 database.

2 THE COURT: At the Secretary of State's office?

3 MR. GALDIERI: At the Secretary of State's
4 office where it is locked down and can only -- it is
5 privileged. It is highly confidential. It can only
6 be released to specific identified persons.

7 THE COURT: So can the Attorney General's
8 office represent to me in court today -- this could
9 move the needle on standing.

10 Can you represent to me in court today that the
11 Secretary of State's office is prohibited from or
12 will not share voter registration information with
13 any law enforcement authority that might enforce
14 these motor vehicle laws? Can you say that today?
15 If you can say that, that makes a difference for
16 standing.

17 MR. GALDIERI: Not having that statute in front
18 of me, I cannot say that with a hundred percent
19 certainty, no, Your Honor.

20 THE COURT: All right. Thank you. That's an
21 honest answer. Do you want to say something? I saw
22 you on your feet as if you wanted to say something.

23 MR. KLEMENTOWICZ: Well, my recollection is
24 that the handmarked checklists that are kept at the
25 town level are eventually sent to the state

1 archives, and I was trying to determine if the state
2 archives are in control of the Secretary of State's
3 office.

4 THE COURT: Well, Mr. Galdieri has already
5 conceived there is a centralized database in the
6 voter registration information, so that doesn't seem
7 to be --

8 MR. KLEMENTOWICZ: I don't think the archive
9 checklists are covered by the same statutory secrecy
10 protections.

11 THE COURT: I see.

12 MR. KLEMENTOWICZ: Because the checklists
13 themselves are public information.

14 THE COURT: What do you say about that?

15 MR. GALDIERI: There are public checklists that
16 have a certain amount of public information on them
17 that are available at the municipal level and would
18 ultimately be archived.

19 THE COURT: Where are the checklists? Where
20 are they?

21 MR. KLEMENTOWICZ: The checklists where you go
22 to register to vote, Your Honor, there's a sheet
23 that the ballot inspector is marking your name down
24 and checking off with a ruler in line.

25 THE COURT: Oh, yeah.

1 MR. KLEMENTOWICZ: That's the checklist.

2 THE COURT: Right.

3 MR. KLEMENTOWICZ: And there is a notation, I
4 believe, on the checklist that says -- that
5 indicates that someone has voted using an
6 out-of-state driver's license.

7 THE COURT: So what about that information,
8 Mr. Galdieri? You didn't mention that.

9 MR. GALDIERI: No, that's correct. That is a
10 portion -- that is public information under our
11 state law. It's available at the town and municipal
12 level. It's available in archives. The Secretary
13 of State, I believe, is authorized to pull only that
14 public information from the database and provide it
15 to certain limited entities like political
16 parties.

17 THE COURT: But if I'm a Keene State student
18 and my name's on that list, that means I registered
19 to vote, right?

20 MR. GALDIERI: If you showed up to vote and you
21 registered to vote, yes.

22 THE COURT: Right. So that would mean if I was
23 allowed to vote, that I represented myself as
24 someone who's a resident of the State of New
25 Hampshire, right? So I've represented myself as a

1 resident. If that information is shared with the
2 state prosecutorial authority and I haven't followed
3 through, I haven't got a New Hampshire driver's
4 license or registered my vehicle, that could be
5 evidence used against me in a criminal case, right?

6 MR. GALDIERI: That could be. Those public
7 records could be.

8 THE COURT: Yeah. All right. Now, by the way,
9 this, to me, doesn't necessarily constitute a burden
10 on the right to vote. I'm just trying to flush out
11 if there's standing.

12 Okay. Okay. I keep interrupting you,
13 Mr. Garland. I'm sorry.

14 MR. GARLAND: It's fine. It's like I'm a
15 tennis bank here.

16 Just a couple more points I'd like to make
17 quickly, Your Honor. Another argument that the
18 defendants have made is that there could be
19 potential confusion based on the information that
20 the Secretary of State provides to training election
21 officials and educating the public. There's no
22 claim in this case, and they certainly -- there are
23 other lawsuits pending. There have been prior
24 lawsuits that have claimed that laws create a
25 confusion and that's the burden on the right to

1 vote. That's not a claim in this lawsuit, so I
2 think that's a bit of a red herring as well.

3 There's discussion of the Secretary of State's
4 obligation under RSA 654:12(5)(d) which requires the
5 statutory requirement that can send letters to
6 people under certain circumstances, usually people
7 who register to vote via affidavit as opposed to
8 showing up with the actual documentation of their
9 domicile. That statute is unchanged by 1264, and it
10 said previously that a -- that it be sent to people
11 who use these domicile affidavits, and it would say,
12 "You may have a collateral consequence," and one of
13 them might be having to get a driver's license.
14 That hasn't changed and it still may be just a
15 collateral consequence.

16 And so I think that based on all of that -- and
17 I understand what your particular concern is here,
18 Your Honor, but I think based on all of that, that
19 there isn't anything that the Secretary of State has
20 done here to cause harm, and there's no way that an
21 order would be directed towards the Secretary of
22 State would redress it. I think that the Attorney
23 General, and then unnamed state officials --

24 THE COURT: But this Court could order --
25 suppose the plaintiff prevailed here. This Court

1 could order that the Secretary of State share no --
2 whether it's the checklists that are archived or the
3 virtually compiled information from the town
4 offices. If this Court ordered the Secretary of
5 State not to share that information with any law
6 enforcement authority enforcing the motor vehicle
7 laws, right, regarding licensure and registration,
8 that's a redress for the injury, isn't it?

9 MR. GARLAND: Yes, I suppose, in terms of
10 enforcement of the actual criminal penalty here.

11 THE COURT: So what just happened to
12 redressability argument?

13 MR. GARLAND: I'm going to have to think about
14 that, Your Honor.

15 MR. GALDIERI: Your Honor, I would be concerned
16 that the Secretary of State can't actually enforce
17 that, but those are public documents held by local
18 town officials.

19 THE COURT: Secretary of State can -- sure.
20 But the Secretary of State can certainly be enjoined
21 from sharing its information. The electronic
22 information compiled from the -- as you described
23 them, compiled from each of the town offices, and
24 the archived checklists.

25 MR. GALDIERI: I don't believe the electronic

1 list that they sell can be sold to law enforcement.
2 I believe it can only be sold to political entities
3 like the Democratic Party, the Republican Party,
4 certain limited entities.

5 THE COURT: Sounds like it wouldn't really
6 know, though. I mean, it sounds like we're doing
7 our best to recall, but sounds like we're grasping
8 at straws. Not grasping at straws. I don't mean to
9 characterize you as desperate. I'm saying that we
10 -- because you might not have anticipated this line,
11 you might -- we don't really know what the various
12 forms of information are, but we do have the
13 archived checklists, right? So let's just keep it
14 with that.

15 If this Court ordered that, "Secretary of
16 State, you may not share that information with any
17 state law enforcement authority enforcing the motor
18 vehicle laws pertaining to licensure or
19 registration," that would be redress for the injury.
20 It would protect the Keene State student from having
21 to deal with that information at his or her trial
22 for failing to register or failing to have a
23 license. That sounds like redressability to me.

24 Anyway, and I -- I guess you know, I wonder.
25 Here's what my real question was when I first

1 started asking what difference does this make?
2 Whether or not the Secretary of State was in the
3 case. I know I wouldn't feel constrained issuing an
4 order that just says, "The State of New Hampshire
5 shall not," or, "The State of New Hampshire shall,"
6 and I would trust the Attorney General's office --
7 you're all very able representatives of the AG -- to
8 notify the agencies involved not to violate the
9 court order.

10 So I just don't view this Court's power and its
11 ability to address these injuries as limited by
12 which state -- I was going to say bureaucrat, but I
13 didn't mean to say that -- which state official is a
14 defendant in the case.

15 Okay. Standing. Anything else?

16 MR. GARLAND: The very last argument I would
17 make, a point I would make with respect to that,
18 Your Honor, and then I'll sit -- I've been up here
19 for a while -- is I think that actually cuts in
20 favor of our position on that. I mean, if there's
21 no reason to believe that the Secretary of State, as
22 a state official, is not going to comply with an
23 order that this Court issues that's going to
24 promulgate misinformation or not going to update
25 information that's on the website, or things along

1 those lines, then it's not clear to me how he would
2 need to be -- I mean, that seems to be pure
3 speculation as to a public official not doing what a
4 public official would be required to do by a court
5 order.

6 We address that a little bit in our filings,
7 and I would just close on that.

8 THE COURT: Mr. Garland, tell me a little bit
9 about your three groups again. I want to make sure
10 I understand them.

11 MR. GARLAND: Yes.

12 THE COURT: Tell me group one, group two, group
13 three, so I can keep track.

14 MR. GARLAND: Yes, absolutely. So that goes
15 back to the injury portion of it in that the first
16 group -- so the way that opposing counsel explained
17 it is you either have to abstain from registering to
18 vote or you have to abstain from driving within the
19 state.

20 So you have the people who choose to register
21 the vote. You have the people who would choose to
22 drive and don't want to pay the driver's license --
23 obtain the New Hampshire driver's license.

24 Well, what that's missing then is that third
25 group of people who live within the State of New

1 Hampshire, at least for a sufficient amount of time
2 to become residents here, that want to vote within
3 the state and become residents with the desire to
4 vote, or become residents for any other number of
5 reasons, but in this case it's focused on becoming a
6 resident by virtue of registering to vote, but have
7 no intention whatsoever of driving within the state,
8 either because they are students who do not have a
9 car and have public transportation available to
10 them, they are elderly, they do not want to drive,
11 they may not be able to get a driver's license. Any
12 number of reasons. Those individuals would be under
13 no obligation under the statute to obtain a driver's
14 license when they have no present intention of
15 driving within the state. So that's the third group
16 of people.

17 THE COURT: The third group then is a resident,
18 a resident of the state, who wishes to vote but does
19 not wish to drive.

20 MR. GARLAND: Exactly. Exactly.

21 THE COURT: Okay.

22 MR. GARLAND: Thank you, Your Honor.

23 MR. KLEMENTOWICZ: Would you like me to turn to
24 standing and Attorney Spencer, or would you prefer
25 to hear the state's merits?

1 THE COURT: I'll stick with standing. I'm
2 sorry.

3 MR. KLEMENTOWICZ: If I may, with the Court's
4 indulgence, I think it might be helpful to set up,
5 to frame the law, what it does --

6 THE COURT: You approach this how you wish.
7 I'm happy to listen.

8 MR. KLEMENTOWICZ: Thank you. So prior to July
9 1, 2019 when HB 1264 came into effect, New Hampshire
10 had statutorily defined domiciliaries and residents,
11 and they were not the same group. And so every
12 person who was a resident was a domiciliary, but not
13 every domiciliary was a resident. So it's the
14 people in that missing sliver who are the ones who
15 are directly impacted by HB 1264, which removed from
16 the definition of resident for the indefinite future
17 and made the two the same.

18 On the standing -- so as a result, when one
19 goes and registers to vote, one is not only
20 declaring domicile, and now residence, but also
21 manifesting it and creating domicile and residence,
22 because the definition for domicile turns on
23 maintaining a single continuous presence for
24 domestic social and civil purposes relevant to
25 participating in self-government.

1 So the act of voting, registering to vote, is
2 participating in democratic self-governance, the
3 prime way most people do that, and so it functions
4 as the manifestation of the intent to do that, as
5 well as an announcement to the State that New
6 Hampshire is your home.

7 So on standing, there are three requirements,
8 of course. There's the injury and effect, there's
9 causation, and there's redressability.

10 So the injury to our clients is, I think, clear
11 as licensed drivers from other states who live in
12 New Hampshire and are now required to choose either
13 not to drive or to buy a New Hampshire driver's
14 license. They have to either spend \$50 and take a
15 round trip ticket -- trip to the nearest DMV, which
16 from Dartmouth is either, I think, North Haverhill
17 or Claremont, 45 minutes each way, we'll say, there
18 and back, without, of course -- and they need to do
19 that to update their driver's license. And if they
20 wait more than the 60-day period, they are not
21 legally permitted to drive to the DMV to update
22 their license.

23 THE COURT: Doesn't everybody in New Hampshire
24 have to drive a long way to get their license pretty
25 much, unless you live in the little southeast

1 triangle of the state? Everybody's got to drive 45
2 minutes to get their license.

3 MR. KLEMENTOWICZ: Well, I think typically one
4 can renew a license online.

5 THE COURT: I think that's true.

6 MR. KLEMENTOWICZ: But I looked this up, and my
7 understanding is that to transfer your license to
8 New Hampshire for the first time, you have to
9 physically go to the DMV.

10 THE COURT: Okay.

11 MR. KLEMENTOWICZ: And I think, though, this
12 doesn't, to my knowledge, apply to our clients, but
13 people who are not U.S. citizens or people with
14 different immigration statuses might have to go to
15 the main DMV in Concord, so there are some people
16 for whom it could be a long drive.

17 So there's the drive and there's the expense.
18 If our clients own a car, or for anyone else who
19 owns a car, they -- regardless of whether they drive
20 it or not, they would have to register it in the
21 state, and as Your Honor knows, New Hampshire has a
22 very expensive car registration system, which can
23 cost hundreds of dollars, and, unlike our neighbor
24 to the south, is required to be done annually.

25 So our position is being forced to choose to

1 relinquish their otherwise statutory entitlement to
2 drive, or paying monies to the state, is an injury
3 sufficient to get them in the door. Because
4 standing doesn't require a huge burden; it requires
5 a trifle of an injury, and that's what this is.

6 In the alternative, we argue that as your
7 questions --

8 THE COURT: But I thought we established,
9 though, that the registration part of this for the
10 plaintiffs in this case is off the table.

11 MR. KLEMENTOWICZ: Our clients do not have to
12 register the cars. They don't own cars, right.

13 THE COURT: Right. You're saying your clients.
14 You mean -- you represent the college kids. College
15 students. I'm sorry.

16 MR. KLEMENTOWICZ: The two college students,
17 yes. Ms. Casey, who is in the back of the room, and
18 Ms. Flaherty.

19 THE COURT: All right.

20 MR. KLEMENTOWICZ: They do not have to register
21 cars. They don't own cars. But they would have to
22 either agree never to drive for the two years in
23 which they live in New Hampshire -- two more
24 remaining years before they're graduating in 2021 --
25 or they have to pay money to the state. So that's

1 the injury.

2 THE COURT: Suppose -- but it's not unlawful to
3 drive in New Hampshire with a license from another
4 state.

5 MR. KLEMENTOWICZ: Now it will be under HB
6 1264.

7 THE COURT: That's my question. Now it will
8 be?

9 MR. KLEMENTOWICZ: Yeah, so there's a penalty
10 provision that the state cites in their pleadings
11 that says it's a fine to be an out-of-state -- I'll
12 pull up the statute, make sure I'm reading this
13 correctly for Your Honor.

14 THE COURT: Yes.

15 MR. KLEMENTOWICZ: "Unless otherwise provided
16 in statute, any person convicted of a violation
17 under any provision of this" --

18 THE COURT: Slow down. You're reading for the
19 record.

20 MR. KLEMENTOWICZ: I apologize. "Or any rule
21 made under authority thereof shall be fined \$50 plus
22 penalty assessment for a first offense. For any
23 subsequent offense" --

24 THE COURT: When you're reading for the record,
25 you have to slow down.

1 MR. KLEMENTOWICZ: Okay. I apologize.

2 THE COURT: But I'm still not clear. I'm
3 trying to figure out how this actually gets proven
4 in court, because that's all that matters. The only
5 way this becomes a burden is if somebody's actually
6 burdened by it and injured by it. And if I'm a
7 Massachusetts-licensed driver, driving with a
8 Massachusetts license, nobody can give me a citation
9 unless what? Unless I declare residency?

10 MR. KLEMENTOWICZ: Right. So RSA 263:35 says,
11 "Any nonresident driver of a motor vehicle who holds
12 a valid driver's license in another jurisdiction
13 upon the establishment of a bona fide residency in
14 the state" --

15 THE COURT: Right.

16 MR. KLEMENTOWICZ: -- "shall have a maximum of
17 60 days from the date his residency was established
18 to obtain a driver's license issued by the State of
19 New Hampshire."

20 THE COURT: And the way -- a couple questions.
21 The way one would establish a bona fide residency,
22 is of course, registering to vote.

23 MR. KLEMENTOWICZ: Yes.

24 THE COURT: Is there any other way?

25 MR. KLEMENTOWICZ: There may be for some

1 people. Obviously, purchasing a driver a license, I
2 think, can function as a declaration of residency as
3 well.

4 THE COURT: But as a practical matter, how does
5 one expose oneself to prosecution for this offense?

6 MR. KLEMENTOWICZ: So I would first
7 respectfully contest the premise of your question.

8 THE COURT: I had a feeling you were going to
9 do that, but go ahead.

10 MR. KLEMENTOWICZ: Which is the burdens will
11 only arise if one is prosecuted for this.

12 THE COURT: Sure. Because there's a chilling
13 effect also.

14 MR. KLEMENTOWICZ: There's a chilling effect.

15 THE COURT: But chill aside. Chill aside.

16 MR. KLEMENTOWICZ: Chill is real, but chill
17 aside.

18 THE COURT: I know chill's real, but I'm the
19 judge. I get to put aside what I want to put aside.
20 We'll put the chill aside.

21 MR. KLEMENTOWICZ: Yes.

22 THE COURT: I'm saying that how does one
23 really -- and it's not to say that the wrong answer
24 to this question forfeits standing. Don't go there.
25 I'm just asking.

1 MR. KLEMENTOWICZ: Yeah.

2 THE COURT: I can't imagine a situation where
3 the Keene college student is pulled over, for what?
4 I mean, I can't imagine any road officer or trooper
5 having knowledge of bona fide residency
6 requirements -- they're going to issue traffic
7 violations, moving violations and the like, but
8 residency violations? Registration violations?
9 Licensure violations? I mean, someone produces a
10 license, they produce a license. When and how does
11 this become a real prosecution, a real case,
12 chilling aside?

13 MR. KLEMENTOWICZ: Sure. So I think that
14 there's a couple ways that this could happen, and
15 since we're focusing only on standing right now --

16 THE COURT: Yeah.

17 MR. KLEMENTOWICZ: -- I'll talk about the
18 driver's license component, but I do think it can be
19 enforced in a different way than the car
20 registration requirement because you don't need to
21 drive so you can be pulled -- that would be easier
22 to enforce. So a person is driving and gets pulled
23 over and the trooper says, "License and
24 registration," and you hand it -- the person hands
25 it to the police officer and they say, "Where do you

1 live? Is this your address?"

2 THE COURT: Yes.

3 MR. KLEMENTOWICZ: "Oh, I live in" -- I don't
4 know the names.

5 THE COURT: "I live in Keene. Why is your tag
6 from Connecticut?"

7 MR. KLEMENTOWICZ: "How long have you lived
8 here?" And you're off to the races. And then a --

9 THE COURT: That's a good answer vis-a-vis the
10 registration. It makes sense.

11 MR. KLEMENTOWICZ: The license.

12 THE COURT: Well, the registration. The
13 license -- oh, yeah, the license, too, because, "How
14 long have you lived here?"

15 MR. KLEMENTOWICZ: Yes.

16 THE COURT: Right. The question only comes up,
17 though -- well, I thought you were making the point
18 that the question only comes up when the officer
19 sees the out-of-state tag on the car, but even
20 examining the license, it could also result in the
21 same question.

22 MR. KLEMENTOWICZ: Yes, yes. And then I would
23 say that the other ways that this will impact people
24 in addition to chill is voter confusion, which is a
25 burden that could come in, and I don't think we know

1 yet how --

2 THE COURT: But again, how does the officer get
3 to bona fide residency, looking at an out-of-state
4 tag on a car on an out-of-state license in the hand?
5 How does the officer get to, "Well, you've declared
6 a bona fide residency"?

7 MR. KLEMENTOWICZ: So they first ask you where
8 you live.

9 THE COURT: I live in Keene. You play the
10 officer. I'll play the driver. "I live in Keene."

11 MR. KLEMENTOWICZ: Right. So I don't think
12 that you get cited for it at the roadside.

13 THE COURT: Might happen down the road.

14 MR. KLEMENTOWICZ: It could. I think that
15 that's -- I don't really do criminal law, but I
16 think it's possible that that's probable cause to
17 get a warrant, if you need one, to examine -- I
18 don't think you would need a warrant to examine the
19 checklist. And the officer could just go and say,
20 "I saw this person. They told me they've lived in
21 Keene for three months. I wonder if they've
22 declared residency by a registering to vote."

23 THE COURT: This gets pretty attenuated but I
24 do see your argument.

25 MR. KLEMENTOWICZ: Okay.

1 THE COURT: It just seems like a remote
2 possibility, but I think -- I think we may disagree
3 on how remote the possibility is. I view it as a
4 remote possibility, but again, I -- I'm much more
5 comfortable addressing that down the road on the
6 merits of this litigation than I am declaring that
7 your clients don't have standing.

8 MR. KLEMENTOWICZ: Well, in that case, I'll
9 move on --

10 THE COURT: Okay.

11 MR. KLEMENTOWICZ: -- to the role of the
12 Secretary of State in this litigation. I think, as
13 Your Honor has pointed out, I don't think it makes a
14 practical difference whether the Secretary of
15 State -- I don't think it's going to change the
16 course of the litigation significantly, or the
17 orders that the Court can grant, if you grant the
18 motion. But I will just point out that the
19 defendant has been the defendant in a series of
20 election law challenges in the State of New
21 Hampshire in the past 10 years, including before
22 this Court in the First Circuit involving laws that
23 he also did not personally administer, so the
24 Rideout versus Gardner case which is a ballot selfie
25 case. It was a violation-level offense like this,

1 and that would presumably also be directly
2 prosecuted by police officers and prosecutors. And
3 the First Circuit has the same obligation to examine
4 its own jurisdiction that you did. I don't remember
5 a discussion of the standing in that case.

6 THE COURT: Yeah. Were there any cases where
7 the issue was actually litigated?

8 MR. KLEMENTOWICZ: Not to my knowledge.

9 THE COURT: I was sort of surprised about that
10 in the briefing. I found myself asking why am I
11 even thinking about this? This seems like a red
12 herring to me, this idea of let's eliminate one of
13 the official capacity defendants from the case.

14 And I think, look, I think we got an honest
15 answer from the AG that it's part of discovery. It
16 may also be about politics, I don't know, but it's
17 at least about discovery.

18 Okay. That's a fair answer. But I think
19 there's -- I think, based on your allegations in the
20 complaint, it may be based -- your allegations may
21 be based, as the defense points out, on a flawed
22 understanding of how the statutory regime would
23 work. You've alleged it, and that's -- at the
24 complaint stage, I think that's what I need to deal
25 with.

1 MR. KLEMENTOWICZ: I'd also like to turn
2 briefly to the three groups of people --

3 THE COURT: Yes.

4 MR. KLEMENTOWICZ: -- who are impacted by the
5 law. And I'm sure there will be more discussion on
6 this on the merits.

7 THE COURT: That's based on your framework that
8 one has to choose between voting or driving. It
9 takes that rubric and says there's a third category
10 who doesn't have to choose. And I assume you don't
11 agree that this third group exists, right?

12 MR. KLEMENTOWICZ: I think that his third group
13 is the same as the second group.

14 THE COURT: Okay.

15 MR. KLEMENTOWICZ: I think there's -- or first
16 group. His third group was people who never
17 intended to drive and so aren't actually
18 relinquishing anything by relinquishing their right
19 to drive, and I think that that really is the same
20 as the second group, which is people who --

21 THE COURT: Choose to vote, right?

22 MR. KLEMENTOWICZ: -- choose to vote and choose
23 not to register their car for whatever reason,
24 whether it's because they don't want to drive, or
25 because they can't afford to buy a New Hampshire

1 driver's license. I think they're the same group.

2 THE COURT: Or register a vehicle.

3 MR. KLEMENTOWICZ: Right. And I would say
4 that -- and this will be true when we discuss it on
5 the merits as well, but this is a 21-B:1 motion
6 which is challenged just to the sufficiency of the
7 allegations, not the accuracy of them, and so it's
8 really a matter for discovery and factual evidence.
9 Because I may be wrong. Those groups may be
10 different, or one may be bigger than the other, and
11 we won't know until we start looking at it.

12 And I don't think I have anything else on
13 standing.

14 MS. SPENCER: Just very, very briefly, Your
15 Honor.

16 THE COURT: There's no need to rush anybody.
17 We're here to -- I'm here to hear arguments, so
18 present them.

19 MS. SPENCER: Just very briefly on standing,
20 Your Honor.

21 To Your Honor's point, what difference would it
22 make, the New Hampshire Democratic Party's standing
23 to maintain this lawsuit has not been challenged,
24 and you only need one party with standing to
25 maintain the lawsuit. So we agree with everything

1 that the ACLU has said. We agree that their
2 individual plaintiffs are outstanding. However,
3 even if they didn't, we do, and so it wouldn't
4 matter.

5 Thank you, Your Honor. Unless you have any
6 questions?

7 THE COURT: No.

8 MS. SPENCER: Thank you, Your Honor.

9 THE COURT: Give me one second. All right. I
10 want to hear your sufficiency arguments as well but
11 I need to take a very brief recess, just two or
12 three minutes.

13 (Recess taken.)

14 THE COURT: All right.

15 MR. ZORACKI: So good morning, Your Honor. As
16 to the sufficiency of the constitutional claim of
17 the plaintiffs complaint, the State's position is
18 straightforward, HB 1264 does not burden or bridge
19 the right to vote. It does not affect the
20 eligibility of voters -- of persons to vote in New
21 Hampshire. It doesn't change anything about the
22 registration and qualifications of voters.

23 THE COURT: That's a meritory argument. We
24 need folks on whether they allege that it bridges
25 the right to vote, not whether it does, right?

1 MR. ZORACKI: Well, I think that's right, but
2 as a matter of law, it doesn't change any of those
3 things. People who are qualified to vote before HB
4 1264 came into effect are still qualified to vote.

5 THE COURT: Yes.

6 MR. ZORACKI: That's because voting is
7 controlled by the domicile statute. That's RSA
8 654:1. Nothing about that statute changed by HB
9 1264. So I think it's entirely appropriate for the
10 Court to address that as a matter of law at this
11 stage of the case.

12 Now, it is establishing residency. The
13 plaintiffs often challenge that position. They
14 suggest that after 1264, it's the act of registering
15 to vote that triggers the obligation to get a
16 driver's license or register your car.

17 Our position is that does not correctly state
18 the law. It is establishing residency in New
19 Hampshire that is demonstrating an intent to make
20 New Hampshire your principal place of physical
21 presence that triggers the obligation.

22 THE COURT: Right, but it's true that before,
23 registering to vote could not incur that obligation,
24 and today, registering to vote can trigger that
25 obligation, right?

1 MR. ZORACKI: So registering to vote today
2 could be an indicator -- well, registering to vote
3 today is an indicator of residency, yes.

4 THE COURT: It didn't used to be until -- not
5 the same way it is now, based on the change in the
6 statute.

7 MR. ZORACKI: I think that's fair, yes, Your
8 Honor.

9 THE COURT: So isn't that the end of the
10 conversation?

11 MR. ZORACKI: No, because once a person
12 establishes the residency in the state, there are
13 certain basic --

14 THE COURT: And now the person establishes the
15 residency by registering to vote. Registering to
16 vote now has a consequence it didn't have previously
17 to the enactment of the statute, right? It has
18 ramifications with respect to the enforcement of
19 motor vehicle laws.

20 MR. ZORACKI: Potentially. It's one -- it's an
21 indicator that that person has decided to choose New
22 Hampshire as their place of residence.

23 THE COURT: It's not an indicator. It's
24 conclusive evidence.

25 MR. ZORACKI: Yes, because the two definitions

1 are equivalent now.

2 THE COURT: So it's not an indicator. It's
3 actually -- it's the establishment of residency. So
4 now registering to vote exposes me to criminal
5 prosecution in a way that it did not before; yes or
6 no? It can be with an explanation, but yes or no.

7 MR. ZORACKI: Yes, but --

8 THE COURT: But?

9 MR. ZORACKI: The fact that that person has
10 decided to become a resident in the State of New
11 Hampshire and has then gone and registered to vote
12 after deciding to become a resident, that is what
13 triggers the obligation.

14 THE COURT: I see what you're saying. You're
15 saying that it's residency which might be
16 established, irrespective of a registration of vote,
17 that actually triggers this -- that actually
18 triggers this obligation.

19 MR. ZORACKI: Yes, Your Honor.

20 THE COURT: I see.

21 MR. ZORACKI: Now, and so -- and once a person
22 establishes residency in the state, there are
23 certain basic incidental features of residency that
24 come along with that. Getting a driver's license is
25 one of them. Registering your car, if you have one.

1 Serving on jury duty, paying taxes, and the like.
2 So a college student here from out-of-state is free
3 to choose his or her place of residence, and all
4 that HB 1264 requires is that he or she do so
5 consistently, and ensures that voters and residents
6 are now placed on equal footing as New Hampshire
7 citizens.

8 Now, I want to address the fact that this is a
9 facial challenge to HB 1264 --

10 THE COURT: Yes.

11 MR. ZORACKI: -- and why this is an improper
12 facial challenge. So HB 1264 is a definitional
13 section of "resident" and it applies throughout all
14 of New Hampshire revised statutes. At the very
15 least, the plaintiffs must show that HB 1264 does
16 not have plainly legitimate sweep. And they can't
17 do that, and that's because they seek a declaratory
18 judgment that HB 1264 is unconstitutional. They
19 don't make any attempt to show that HB 1264's
20 application throughout all the applicable statutory
21 chapters is unconstitutional, and for that reason,
22 their facial at that fails.

23 Now, as we argue in the papers, our position is
24 HB 1264 doesn't alter the voting requirements in New
25 Hampshire, and therefore, you don't even need to get

1 to an Anderson verdict type-analysis. But even if
2 this Court does engage in that analysis, our
3 position is HB 1264 still easily withstands that
4 scrutiny because it imposes, at most, only a minimal
5 right to vote. As Your Honor pointed out before,
6 getting a driver's license --

7 THE COURT: Wait. Are you still in your sweep
8 of the statutory argument or have you moved on to
9 something else?

10 MR. ZORACKI: I've moved on.

11 THE COURT: What have you moved on to?

12 MR. ZORACKI: So I'm getting into the Anderson
13 verdict framework.

14 Even if the Court were to engage in that
15 analysis and construe this as a law that affects
16 voting, we still withstand that scrutiny.

17 THE COURT: But again, it's -- it sounds like a
18 merits argument to me. This is a motion to dismiss.
19 You know -- go ahead.

20 MR. ZORACKI: So our position is that obtaining
21 a driver's license, registering -- or registering
22 your car, these are just basic features of residency
23 that everyone has to do as residents of New
24 Hampshire. There was nothing -- you know, these are
25 not difficult to meet. It simply requires college

1 students and other allegedly affected voters meet
2 the same standards as any other person that -- meet
3 the standard that any other person that's required
4 to vote.

5 So as the Supreme Court -- I think what the
6 Supreme Court did in Crawford, albeit that was on a
7 factual record, when you consider the broad
8 application of HB 1264 to all New Hampshire voters,
9 it imposes only a minimal burden on New Hampshire
10 voters.

11 Now, it's also important -- getting to the
12 State's interest. So our position, it's at most a
13 minimal burden. I think they've alleged in their --
14 or they've said in their objection, in the 2016
15 election, it impacted perhaps somewhere in the
16 neighborhood of 5,000 voters would be potentially
17 impacted by this. That's a very small percentage of
18 the overall New Hampshire population. I think it's
19 less than one half of one percent. So viewed in
20 that context, this is a very minimal burden and it's
21 a common feature of residency to have to go get a
22 driver's license.

23 THE COURT: And you don't measure burden by how
24 many people are affected, do you? You measure
25 burden by the effect on each potential voter, right?

1 MR. ZORACKI: Well, I think in Crawford, the
2 Court -- one of the things they pointed out was the
3 broad application of the law to --

4 THE COURT: If only 10 African Americans live
5 in our state and the state passes a statute that
6 says some type of racial barrier, it wouldn't matter
7 because only 10 people are affected?

8 MR. ZORACKI: I think that's true. That's
9 race. I think that's a totally different scheme and
10 analysis.

11 THE COURT: Well, it's a classification of
12 person, but the right to vote is fundamental. It
13 doesn't seem to me that the number of people
14 affected -- you were trying to tell me where it
15 matters. Go ahead. I interrupted you.

16 MR. ZORACKI: Well, in Crawford, this is one of
17 the things that the Court pointed to, is that they
18 pointed out to the broad application across all
19 voters is a relevant question. Here, the allegation
20 is it's very minimal. There's very few people
21 affected by this.

22 THE COURT: I think that's true.

23 MR. ZORACKI: Now, so our position. It's a
24 minimal burden and it's supported by very compelling
25 state interests. What HB 1264 does is put residents

1 and voters on equal footing as New Hampshire
2 citizens. That's what HB 1264 was designed to do.
3 Prior to HB -- prior to the law, it kind of had the
4 separate class of voters, college students among
5 them, but there may be others -- there are others,
6 including other transitory persons who are in New
7 Hampshire. And what HB 1264 does, it ensures a
8 community of interest across all voters, and ensures
9 that they're all treated equally.

10 So our position. There's a strong state
11 interest here, there's no dispute that New Hampshire
12 has a strong interest in regulating residents who
13 operate and drive motor vehicles on New Hampshire
14 roadways.

15 THE COURT: But that's not what the statute
16 does. I'm trying to -- you know, tell me how the
17 statute is going to work. We tried talking about
18 that a little bit with standing. How does this --
19 how does this statutory regime now -- which puts
20 voters and residents on an equal footing, I agree.
21 It's enforced through the motor vehicle laws. Tell
22 me how this statutory regime is going to be
23 enforced. What's going to change?

24 MR. ZORACKI: From an election point of view,
25 nothing. Under the election laws, nothing changes.

1 And that's our position, and that's why we think
2 this case can be resolved at the motion to dismiss
3 stage.

4 THE COURT: How is it going to -- how is it
5 going to change the enforcement of motor vehicle
6 laws?

7 MR. ZORACKI: I think that's a difficult
8 question to answer in the abstract without a
9 concrete case in front of us.

10 THE COURT: Okay. If you want, we can do that.
11 Do you want to start doing that? I can just start
12 coming up with roadside interactions that you can --
13 I don't think you're going to have an answer for
14 that because I don't think you know. I don't think
15 anybody here knows how the law -- the motor vehicle
16 laws are going to change. I think that me and
17 Mr. Klementowicz were coming up with some fanciful
18 examples. I didn't mean to suggest they were
19 fanciful, but not-that-likely scenarios.

20 Here's the thing. If we can't think of any way
21 this law changed election laws and we can't think of
22 any ways this law changed motor vehicle laws, what
23 is this law and what does it do? According to you,
24 nothing changes. Nothing changes. So what's going
25 on here, except maybe some people being discouraged

1 from voting.

2 MR. ZORACKI: I think there's certainly a
3 potential, the potential that if the person becomes
4 a resident and they become subject to, you know, all
5 of the incidence of residency, including getting a
6 driver's license, registering their car. There are
7 scenarios, I think, that where -- you know, in
8 roadside encounters and otherwise. Sure, I mean,
9 that could -- conceivably, we could come up with
10 scenarios, as we did before, where this law's
11 enforced that way. I think that's how it would end
12 up getting enforced, in those situations.

13 THE COURT: Okay. How? I mean, I think -- I
14 think what Mr. Klementowicz was speaking about as
15 the possibility -- and I don't even think he was
16 suggesting this was very likely, but the possibility
17 that one is driving with a license, an out-of-state
18 license, or with an out-of-state registered vehicle,
19 and either during the interaction with the officer
20 makes a disclosure that the driver has lived
21 in-state for a substantial period of time, that
22 might lead to a charge of -- because the person not
23 driving an unregistered vehicle and the person is
24 not an unlicensed driver unless the definition of an
25 unlicensed driver is someone who has lived in -- is

1 a resident but holds an out-of-state license.

2 MR. ZORACKI: I mean, we are talking about
3 enforcement, but when the legislature passes a law
4 that is designed to, you know, treat all residents
5 and voters equally, I think it's -- the legislature
6 can expect that people are going to follow that law
7 and that, you know, once -- once they become a
8 resident, they're registered to vote here, and
9 they're a resident, they're expected to follow --
10 it's expected that residents are going to follow the
11 law and pay the required fees as a -- or obtain
12 their driver's license, pay car registration fees.

13 THE COURT: That's true. There's really no
14 question that the legislature was attempting,
15 through motor vehicle regulation, but what the
16 legislature was attempting to impact here was our
17 elections, to ensure that -- I forget the term you
18 used -- to ensure that it's like an invested
19 electorate, right? It's meant to have an impact on
20 our elections as opposed to our rules of the road.

21 MR. ZORACKI: I think what the legislative
22 record shows, the committee report that the Court
23 can take judicial notice of, doesn't reflect that.
24 It reflects the purpose of this law was to equalize
25 these two previously separate classes of voters.

1 They've now made them equal. I think that is what
2 the purpose of this law was.

3 THE COURT: Just for some sense of cosmic logic
4 and equilibrium in the universe or to impact our
5 elections?

6 MR. ZORACKI: There's nothing showing in the
7 registry of record that reflects that. The purpose
8 of this law was to equate the two, and I think
9 that's --

10 THE COURT: To what end? To what end?

11 MR. ZORACKI: To ensure a community interest of
12 voters so that there's not a separate class of
13 voters.

14 THE COURT: Election laws. Election laws,
15 right? It's not because it's going to make them
16 better drivers on the roads that they declared
17 themselves residents. If they declared themselves
18 residents, it's going to make sure that our
19 electorate, the motive of the law, is people are
20 invested in the community. It's to affect our
21 elections.

22 MR. ZORACKI: It's to ensure that all voters
23 and residents are treated the same. That's the
24 point of it.

25 THE COURT: Again, so just for equity's sake,

1 this is an equity statute meant to make sure we're
2 treating everybody the same. It's not to improve
3 the state of our elections in our electorate as
4 making sure it's more constituted in the view of the
5 legislature of people who are invested in the
6 community. It's not that?

7 MR. ZORACKI: I think those are one and the
8 same. And I think some of what your question, I
9 think, gets to is the motivations of --

10 THE COURT: Yeah.

11 MR. ZORACKI: -- the various legislators, but
12 as the Supreme Court said, the plurality in
13 Crawford, if a law is supported by valid neutral
14 justifications --

15 THE COURT: Sure.

16 MR. ZORACKI: -- those justifications shouldn't
17 be just disregarded simply because partisan
18 interests may have provided one motivation for the
19 votes of individual legislators.

20 THE COURT: Sure.

21 MR. ZORACKI: Now, unless the Court has any
22 further question on the 14th Amendment argument, I'd
23 like to move to the 26th Amendment argument.

24 THE COURT: Motivations matter there, don't
25 they?

1 MR. ZORACKI: Well, under the plain text of the
2 26th Amendment, a state cannot deny or abridge the
3 right to vote on account of age. And our position,
4 as we've gone through, is this has no effect on the
5 eligibility, voter eligibility or the voting
6 process, so there's no denial or abridgement of the
7 right to vote.

8 THE COURT: Do you deny that it impacts the
9 right to vote with a greater degree for younger
10 voters than it does for older voters?

11 MR. ZORACKI: I don't -- I don't think
12 that's --

13 THE COURT: Haven't the plaintiffs alleged
14 that?

15 MR. ZORACKI: They've alleged that. And I
16 mean, I think their allegations have sort of
17 evolved. Originally it was college students but
18 transitory voters, medical residents, others.

19 THE COURT: Do you have some reason to believe
20 that the numbers of transitory voters and medical
21 residents comes close to the numbers of college
22 students involved, the younger voters?

23 MR. ZORACKI: I don't -- I don't know.

24 THE COURT: All right.

25 MR. ZORACKI: But I think one -- two of the

1 cases that they, I think, rely on, or talk about
2 most in our papers was Walgren and a Florida case
3 called Detzner.

4 THE COURT: Yes.

5 MR. ZORACKI: Those are clearly different cases
6 where you had election officials making decisions
7 that were specifically targeted at college students.
8 So in Walgren, it was scheduling an election during
9 a college recess.

10 In Detzner, it was a Florida official's
11 decision to prevent a university building from being
12 used as an early voting place.

13 So those are clearly just targeted at college
14 students, and that's it. And there's a law saying
15 that college students are a proxy for younger
16 voters. Here we don't have that. Here we have a
17 law that applies statewide. It's going to affect
18 young voters in the 18 to 21 category, regardless of
19 whether or not they're college students.

20 THE COURT: Yes.

21 MR. ZORACKI: And as we lay out in our papers,
22 that takes us out of the 26th Amendment framework,
23 and they fail to see a claim on that basis.

24 THE COURT: Thank you.

25 MR. KLEMENTOWICZ: I'm sorry, I wasn't sure if

1 he was moving on to his 24th Amendment.

2 THE COURT: No, he sat. That's the universal
3 signal for "I'm done talking."

4 MR. KLEMENTOWICZ: Understood.

5 THE COURT: I don't mean to be a wise guy. Not
6 the universal signal; it's just the courtroom
7 signal, right, for "I'm done talking." That's our
8 universe here.

9 MR. KLEMENTOWICZ: So --

10 THE COURT: This dispute here between
11 misdemeanor and violation, you say this exposes
12 nonresidents to misdemeanor prosecution, and they
13 say it's only a violation law. Do you contest their
14 view that it's only a violation-level offense?

15 MR. KLEMENTOWICZ: I think that they're right,
16 that is a violation-level offense --

17 THE COURT: Okay.

18 MR. KLEMENTOWICZ: -- but I don't think it
19 matters because --

20 THE COURT: Understood. But it is a violation.

21 MR. KLEMENTOWICZ: I think that's right. The
22 Rideout case, the ballot selfie case, was a
23 violation offense as well.

24 THE COURT: I don't think it matters for
25 standing but you can probably see it might matter

1 down the road, right?

2 MR. KLEMENTOWICZ: I can see that it might
3 matter down the road but I don't think that --

4 THE COURT: No pun intended.

5 MR. KLEMENTOWICZ: -- it can be addressed
6 without a factual record --

7 THE COURT: I don't think we disagree about
8 that.

9 MR. KLEMENTOWICZ: -- to get into.

10 First, I'd like to take the facial challenge
11 versus as-applied piece. And I pulled up a quote
12 from Judge McCafferty in the Saucedo case, which was
13 the signature mismatch case that she had where a
14 similar claim was raised. And the Court in that
15 case wrote that, "Therefore, in practice, a facial
16 challenge is best understood as a challenge to the
17 terms of the statute, not hypothetical applications,
18 and is resolved simply by applying the relevant
19 constitutional test to the challenge statute."

20 So the idea is if voting rights law violate --
21 if a law violates the Anderson verdict standard or
22 any other 26th Amendment, 24th Amendment, there's no
23 set of circumstances in which that law can be valid,
24 and so it's unconstitutional.

25 I'd also like to respond sort of separately to

1 the claim that plaintiffs need to show that every
2 single definition of "resident" in the RSAs needs to
3 burden the right to vote to be unconstitutional.
4 And I think about that by way of analogy to an
5 example. If the State had hypothetically passed a
6 law that said anyone who is interacting with any
7 governmental official needs to pay \$5, well, that
8 would obviously impact a lot of different services
9 in the government. And it may not be
10 unconstitutional to charge someone \$5 for a library
11 card, but it's a pretty explicit poll tax. And the
12 fact that the State has done it in a way so that it
13 impacts every interaction with the government and
14 not just voting, doesn't save it from judicial
15 scrutiny.

16 Turning next to the Anderson verdict standard.

17 The State's -- sorry, the defendants' first
18 argument is that the Anderson verdict simply doesn't
19 apply because this is not an election law, and I
20 think the Court has a good handle on that. But I
21 would just point out that the language from Burdick
22 which is cited in the State's memorandum in support
23 of its motion on page 22, which notes that,
24 "Anderson/Burdick is the appropriate standard for
25 evaluating a claim that state law burdens the right

1 to vote."

2 And that's the question, is whether it burdens
3 the right to vote, not where it's codified in the
4 statutes. And if that were the question, then one
5 would look at the ample legislative record and the
6 statements of the sponsors from Senator Innes who
7 said, "If you are from Boston and you're up here
8 eight months out of the year and you're registered
9 to vote there, you shouldn't be able to vote
10 here." Or Senator Carson who said, "Stop drive-by
11 voting in NH. The student being interviewed
12 actually makes the case for the legislation. He
13 wants to keep his out-of-state driver's license and
14 drive his out-of-state registered car because he
15 doesn't live in NH, but wants to vote in our state
16 elections."

17 So I think it's pretty clear that the
18 Anderson/Burdick framework is an appropriate
19 standard to evaluate this case.

20 So that then turns to the next inquiry which is
21 how burdensome is it and where on the sliding scale
22 of Anderson/Burdick evaluation scrutiny does this
23 case fall?

24 So when you plead that the burdens are severe,
25 the burdens -- \$50 to purchase a driver's license,

1 hundreds of dollars to register your car, we think
2 that there could be around 5,000 people, at least as
3 of 2017, who were impacted. We don't know really
4 who those people are right now, whether they're a
5 particular group or not. We allege that they are,
6 but that's for discovery and for evidence.

7 THE COURT: Doesn't that seem incongruous,
8 though? Incongruous. Doesn't that seem
9 perfectly -- this isn't a standing argument or
10 standing or even a sufficiency argument, so I'm just
11 asking. Doesn't it seem completely reasonable that
12 the State would expect a person who declares himself
13 or herself a resident, and who drives and owns a
14 vehicle, to at least participate in the State's
15 public fisc enough to contribute that few hundred
16 bucks to do one's share as a resident? Does it
17 really make -- doesn't that make sense?

18 MR. KLEMENTOWICZ: That's what the law was
19 before HB 1264, because it was always the case that
20 residents had to pay to register their car, but
21 what --

22 THE COURT: What wasn't the case was you had to
23 be a resident to vote. You had to have domicile to
24 vote.

25 MR. KLEMENTOWICZ: That's right. So I do

1 think --

2 THE COURT: So I'm asking about the real --
3 when you sort of put aside the whole anger about
4 drive-by voting, the rational response to drive-by
5 voting is that, you know, one might expect the
6 person who declares oneself a resident, and who
7 drives and owns a vehicle, should contribute. And
8 that's part of the citizen -- that's part and parcel
9 to the rights and obligations of a citizen that come
10 with voting.

11 MR. KLEMENTOWICZ: Well, so I --

12 THE COURT: No?

13 MR. KLEMENTOWICZ: I think it's the "that come
14 with voting" part that's --

15 THE COURT: That come with voting by a person
16 who owns vehicle and drives. That's what I'm
17 saying.

18 MR. KLEMENTOWICZ: But it's the "that comes
19 with voting" part that I think is the real crux of
20 our case here --

21 THE COURT: Okay.

22 MR. KLEMENTOWICZ: -- because it's -- these
23 obligations are encouraged. You do need to own a
24 vehicle in order to have to register a vehicle. I
25 agree with that. But if you own a vehicle and you

1 register to vote in New Hampshire, now you have --
2 now you have to pay to register your car. And
3 that's hundreds of dollars. And that requirement
4 that you register your car and pay those \$200
5 springs directly from the decision you made to
6 register to vote and to vote in New Hampshire.

7 Now, there may be other ways that you can
8 establish residency.

9 THE COURT: So I should be able to -- it's not
10 constitutionally permissible for a state to say,
11 "No, it's not okay for you to pay to drive in
12 another state and pay to register a vehicle in
13 another state and contribute to the upkeep of their
14 roads and bridges, but vote in this state." That's
15 an unconstitutional distinction to make?

16 MR. KLEMENTOWICZ: So I think that the way to
17 think about it is inside the Anderson/Burdick
18 framework, at least in this challenge, which is what
19 is the severity of the burden, and if it's a severe
20 burden. If it is, as we allege, \$50, hundreds of
21 dollars, round-trip ticket to DMV, trip to the town
22 clerk's office --

23 THE COURT: That all sounds very burdensome,
24 okay, to a destitute person who may live in our
25 state, actually reside here, but it doesn't sound

1 that burdensome to a person who owns and drives a
2 car, does it? I'm asking you.

3 MR. KLEMENTOWICZ: I think you need evidence on
4 that.

5 THE COURT: Like I said, this isn't really a
6 sufficiency argument. I'm just having the
7 conversation. Because I think you can see where
8 we're going here.

9 MR. KLEMENTOWICZ: I can.

10 THE COURT: I think your lawsuit's going to go
11 on. But it's a problem. It's a problem because
12 it's not the same to say to the person who lives --
13 you know, to the disabled veteran, okay, who doesn't
14 own a car, doesn't drive, lives in Harbor Homes in
15 Nashua and really walks three or four blocks a day
16 and that's his universe, right? That sounds
17 burdensome if that person wants to vote. It doesn't
18 sound very burdensome to a person who owns and
19 drives a car.

20 MR. KLEMENTOWICZ: So here are the people who I
21 think that it actually would be burdensome to: Is a
22 young college student who doesn't own a car, but is
23 licensed to drive and may be called upon, as Your
24 Honor said, to be a designated driver on a frat
25 party back to his house to make sure that people --

1 you know. And that person, to that person, \$50 may
2 be a lot. And I think there are a lot of people who
3 drive in New Hampshire to whom \$50 is a lot.

4 So I also think that the people who are
5 burdened are going to be the people who -- to whom
6 \$50 is a lot and who decide not to vote, because
7 they don't want to incur the risk of arrest for
8 civil or criminal violation-level offenses,
9 involvement with the police, or --

10 THE COURT: But again, those are a violation.
11 Those are violation-level exposure.

12 MR. KLEMENTOWICZ: Yes, yes, but they're
13 treated in state court on a criminal docket, I would
14 imagine.

15 THE COURT: Oh, yes. Yeah.

16 MR. KLEMENTOWICZ: And it's, you know,
17 embarrassing being in front of -- I would imagine.

18 So I do think that those are the burdens. But
19 just to walk through the theory, I think this case
20 is governed directly by the Cruz versus Melecio case
21 which was the First Circuit case involving the
22 political group in Puerto Rico that wanted to get
23 onto the ballot, and have alleged that the scheme of
24 requiring a certain number of signatures that had to
25 be notarized by an attorney violated

1 Anderson/Burdick. And the Cruz court said, "Given
2 the nature of the inquiry," which is that they've
3 alleged sufficient facts to find that it's a severe
4 burden, "We can't look past that on a motion to
5 dismiss."

6 That's the same result reached by Judge
7 Barbadoro in the Libertarian Party of New Hampshire
8 case versus Gardner where he says, "I can't predict
9 if the parties are going to be able to prove that
10 it's a burden or that it's unreasonable."

11 And by the way, to the legislative intent
12 question and the State's justification, I think
13 there is an argument that probably will be addressed
14 down the line that at least the high levels of
15 Anderson/Burdick scrutiny, the justification offered
16 in defense of the law has to be the actual
17 justification and not one invented post hoc in
18 response to litigation. I checked the Guare versus
19 State of New Hampshire case for the New Hampshire
20 Supreme State Court for that proposition. And so I
21 think there will be evidence and maybe ensuring a
22 community of interest is an appropriate compelling
23 state interest, but as the Dunn court recognized,
24 it's also one that's susceptible to abuse.

25 And Newburger versus Peterson from this court

1 found likewise and struck down the durational
2 residency requirement saying that that wasn't
3 sufficiently tailored to advance that interest. Our
4 argument will be, later down the line, that neither
5 is this.

6 THE COURT: Yes, I understand.

7 MR. KLEMENTOWICZ: If I can just have a moment?

8 Oh, and as to the number of people, I know that
9 that was mentioned earlier, the number of people who
10 are impacted, the Saucedo, the signature mismatch
11 case with Judge McCafferty involved, I think, around
12 300 disenfranchised votes that were discarded, which
13 is obviously fewer than 5000, so if you look at the
14 character and magnitude that it can, it can be
15 relevant that it impacts a large swath of people,
16 but it doesn't have to. And I think this probably,
17 the evidence will show, eventually does impact
18 enough people.

19 THE COURT: Yeah, I think the argument -- no
20 disrespect intended, but I think the argument that
21 the State of New Hampshire, that affecting 5,000
22 voters is not sufficiently impactful. It's just
23 unpersuasive. 5,000 is a lost votes in New
24 Hampshire.

25 MR. KLEMENTOWICZ: Four times the margin of

1 victory between -- in the U.S. senate race in 2016.

2 You asked what is the law and what does it do
3 to opposing counsel. I think we plead in the
4 complaint that the purpose and effect of the laws
5 can be to scare young voters away from voting, and
6 that's why it was passed and that's what it's going
7 to do. And I think perhaps that's why nobody really
8 knows how it's going to be enforced is because that
9 wasn't its true motivation when it was passed, which
10 I think is a nice segue to the --

11 THE COURT: Look, I don't think anybody here
12 would dispute, either side, that when you boil it
13 down, the purpose of the law is to discourage or
14 prevent nonresidents from voting, right? I mean,
15 one must be -- one must be a resident to vote. One
16 should be a resident to vote, and must declare
17 oneself a resident at the time of the registration
18 of voting.

19 I don't know if I characterize it as scaring
20 people or intimidating people not to vote. It's
21 just ensuring that people who aren't really
22 residents don't vote. The question is, is the way
23 we've defined that lawful? When I say "we," I mean
24 the State of New Hampshire. Lawful.

25 MR. KLEMENTOWICZ: And was there a further

1 purpose of making it difficult -- more difficult or
2 more burdensome for young voters to vote.

3 THE COURT: What if it was -- what if it was to
4 make young voters -- what if it was to make it more
5 burdensome for young voters to vote who are not
6 residents of our state?

7 MR. KLEMENTOWICZ: I think --

8 THE COURT: That's permissible, isn't it?

9 MR. KLEMENTOWICZ: I'd have to think about it
10 but I would -- tentatively I would say no.

11 THE COURT: You'd say not permissible?

12 MR. KLEMENTOWICZ: Not permissible to target
13 young voters as a class.

14 THE COURT: Young voters who are not residents,
15 is my question.

16 MR. KLEMENTOWICZ: Right, but that still is a
17 distinction between all voters who are not
18 residents.

19 THE COURT: I see.

20 MR. KLEMENTOWICZ: And so under the 26th
21 Amendment, the Walgren two-part exam has said that
22 the -- it's difficult to imagine that the people
23 who --

24 THE COURT: It's just that the only
25 nonresidents who are trying to vote really are

1 younger, right? I mean, in reality. It's not like
2 there's -- you talked about, what is it, transient
3 population and medical. I mean, I don't know
4 anybody who's focused on that as a practical
5 matter.

6 MR. KLEMENTOWICZ: Yeah, so the Newburger
7 versus Peterson case gives other examples of people
8 who fall within this durational residency, though.
9 It says, "A newly arrived executive with a firm
10 intention to retire to his Florida cottage at age
11 65" --

12 THE COURT: The durational -- this Court's
13 already rejected that.

14 MR. KLEMENTOWICZ: Right, but this is -- it's a
15 similar -- it's the same group of people who are
16 targeted because this is imposing -- it's removing
17 the durational requirement from residency, right?
18 So it's going to impact the same group of people.
19 It's just in Newburger they tried to move domicile
20 up, and here they tried to move residents down.

21 We principally advance a challenge on the basis
22 of targeting young voters in part because that's who
23 we think the legislature is aiming at, and in part
24 because they are a constitutionally protected class
25 for the purposes of voting under the 26th Amendment.

1 And so the Detzner case, which cites a couple
2 other cases including One Wisconsin Institute versus
3 Thompson which is at 198 F. Supp. 3d 896 from the
4 Western District of Wisconsin, and Lee versus
5 Virginia State Board of Elections, 188 F. Supp. 3d
6 577, Eastern District of Virginia, talk about how
7 the Arlington Heights framework is increasingly
8 being adopted by courts as the proper framework to
9 consider challenges under the 26th Amendment.

10 And the Arlington Heights framework focuses on
11 whether there's a discriminatory end, a legal
12 purpose behind the law, and if it is, that law's
13 struck down. And so the sources that the Court has
14 to examine for that are the legislative history, the
15 groups impacted, the legislative intent, and the
16 history of attempts by the state or by governmental
17 officials to target those groups in the past. And
18 we lay those out into our complaint. And I'm not
19 going to get into all of them, but I will mention
20 some of them.

21 I read you two quotes from two of the senators.
22 There's more. There's a quote from Representative
23 Moffett in our complaint. There's a long history in
24 New Hampshire going back at least to Peterson, but
25 more recently with the law that was challenged in

1 the Guare decision, the law that was challenged in
2 the League of Women Voters case (inaudible) from
3 2017, and this bill, all targeted at young voters,
4 nonresident voters, nondomiciliary voters as a
5 class. College student voters, for example.

6 The -- Judge Brown from Hillsborough County
7 Superior Court North in the order on preliminary
8 injunction that he issued in 2018 noted that the
9 senate bill three was going to cause especially long
10 registration lines, especially in Durham and
11 Hanover. And so that is, of course, a targeting of
12 young and college student voters as a class.

13 And this is -- I'll just say that this is a
14 highly factually intensive inquiry that can't be
15 resolved (inaudible).

16 So I will turn to the 24th Amendment claim and
17 just note that this is a law that requires one to
18 purchase a driver's license or a car registration if
19 you drive a car as a result of voting. It's
20 literally fees being paid to the Treasury that are
21 incurred because of a decision made to register to
22 vote. And I'd cite the Harman case for the
23 proposition that the 24th Amendment prohibits
24 sophisticated as well as simple poll tax schemes and
25 for the quote that, "It hits owners' procedural

1 requirements which effectively handicap exercise of
2 those claiming their constitutional immunity as
3 well."

4 So it's a sophisticated way to do it. I don't
5 think there's any denial about that, but it's money
6 flowing from the decision that's made to register to
7 vote.

8 So if I could have a minute to just confer with
9 counsel?

10 THE COURT: Sure.

11 MR. KLEMENTOWICZ: That's all I have.

12 THE COURT: Thank you. Let me ask.

13 Ms. Spencer, let me ask you something.

14 MS. SPENCER: Yes, Your Honor.

15 THE COURT: You've asserted standing on behalf
16 of the members and candidates of the party, but you
17 didn't name any. Are you claiming standing as an
18 institution or on behalf of members?

19 MS. SPENCER: Both. Both, Your Honor. And
20 it's well -- it's unchallenged and it's well
21 established that political parties have standing to
22 challenge the constitutionality of state laws --

23 THE COURT: Yes, yes.

24 MS. SPENCER: -- both on behalf of its members
25 and on its own behalf.

1 THE COURT: I guess it's moot. There's clear
2 authority for that.

3 MS. SPENCER: We're, in fact, involved. I'd
4 like to just make a few comments.

5 THE COURT: Sure.

6 MS. SPENCER: First, the New Hampshire
7 Democratic Party concurs with everything that the
8 ACLU has said, but to address a couple pointed
9 issues that Your Honor raised, what's really going
10 on here, right? I think that the Court has a good
11 handle on the fact that this is a law that affects
12 voting on Anderson/Burdick is a proper analysis.
13 But to go back to at the motion to dismiss stage,
14 the relevant inquiry, as you've pointed out, is what
15 we properly pleaded in the complaint.

16 And we properly pleaded in the complaint that
17 the Republicans in the legislature passed HB 1264 to
18 burden the right to vote. We've alleged in the
19 complaint that 2016 was a close election and that
20 the Republican legislature's solution to that was to
21 enact HB 1264 to intimidate students from
22 registering to vote, confuse them, and effectively
23 suppress their vote. The legislature thought that
24 if they could burden the right to vote of college
25 students, they could change the outcome of the next

1 election.

2 And contrary to what the State has said in the
3 complaint, we allege that the legislative record
4 actually bears that out. As Attorney Klementowicz
5 cited, we have alleged six different statements from
6 Republican senators, as well as a statement on
7 Facebook from Representative Michael Moffett, where
8 he said specifically, and I quote, "Many
9 out-of-state college students in Durham, Plymouth,
10 Keene, Manchester, and Henniker and Hanover
11 registered late and most voted Democrat. Ayotte had
12 her reelection stolen from her by out-of-staters and
13 Clinton's razor-thin victory was stolen as well."

14 There are other similar statements that I
15 won't -- well, I will mention a couple, because
16 several of them were on the senate floor.

17 Senator William Gannon stated on the senate
18 floor that a UNH student who graduated from high
19 school in another state does not, "Really have skin
20 in the game."

21 And Senator Andy Sanborn expressly explained
22 that the bill was designed to ensure that if you're
23 going to participate in New Hampshire elections,
24 that you have some long-term vested interest in the
25 state.

1 So as part of the Anderson/Burdick analysis, we
2 additionally allege and, under Cruz, are entitled to
3 take discovery on that precise interest, because we
4 believe that there is evidence not only that the
5 purported interest can be abused, but that it may
6 not actually have been the real interest, which
7 under Cruz is what must be weighed against the
8 burden in this case.

9 And additionally, that those burdens that we're
10 entitled to discovery on as well. The financial
11 burden that Your Honor mentioned, I couldn't --
12 college students who are driving, you know, a
13 20-year-old car, who are struggling to pay for food,
14 which is an issue right now, and tuition.

15 THE COURT: So it's not reasonable for the New
16 Hampshire legislature to want their automobile
17 registration funds to help maintain New Hampshire
18 roads instead of Massachusetts roads? That seems
19 reasonable to me.

20 MS. SPENCER: So New Hampshire has a domicile
21 statute, and the domicile statute addresses the
22 connections that the students have to have to the
23 state in order to vote, but these students pay into
24 the state in other ways. They, well, one, pay large
25 sums of money to New Hampshire institutions to

1 attend school. They go to New Hampshire
2 restaurants. They buy books, clothes in New
3 Hampshire.

4 THE COURT: So what's the commitment of a
5 student who asserts domicile under 654:1? What's
6 the degree of commitment vis-a-vis the degree of
7 commitment for residency, the residency declaration
8 when you vote?

9 MS. SPENCER: I'm not sure I understand the
10 question, Your Honor. The domicile statute --

11 THE COURT: I guess I don't understand why you
12 raise domicile? What's that about?

13 MS. SPENCER: That --

14 THE COURT: You mean the old law?

15 MS. SPENCER: Yes, Your Honor, the old law.
16 That's right.

17 THE COURT: Okay.

18 MS. SPENCER: And unless Your Honor has any
19 other questions specifically directed at New
20 Hampshire or the party, I don't want to burden
21 time.

22 THE COURT: I don't think I do, no. You
23 answered my question about standing for the party.

24 MS. SPENCER: Thank you, Your Honor.

25 THE COURT: Just give me a moment.

1 MR. ZORACKI: Sure.

2 THE COURT: I guess this is for you,
3 Mr. Klementowicz, right? 21:6 defines a resident --
4 defines a resident, right? "Except that no person
5 shall be deemed to be a resident who claims
6 residence in any other state for any other
7 purpose."

8 That applies to your clients, doesn't it?

9 MR. KLEMENTOWICZ: Well, so --

10 THE COURT: Don't your students claim residence
11 in other states for other purposes?

12 MR. KLEMENTOWICZ: So my understanding is that
13 you establish residence in a state and you keep it
14 until you establish residency in another state.

15 THE COURT: Yes.

16 MR. KLEMENTOWICZ: And so prior to 1264 when
17 they registered to vote, they weren't establishing
18 residence in another -- or they were keeping their
19 residence in their home state because they had not
20 established a new residence in New Hampshire because
21 they did not have an intent to remain for the
22 indefinite future.

23 THE COURT: Don't your clients claim residency
24 in other states than New Hampshire?

25 MR. KLEMENTOWICZ: I think that the residency

1 in other states may not be the same definition as it
2 is in New Hampshire, and so it may be some states
3 have switched the residents and domicile terms, so
4 some states may --

5 THE COURT: Try this way, then. Don't your
6 clients claim residency, as defined by our state, in
7 other states?

8 MR. KLEMENTOWICZ: They certainly did at the
9 time that the lawsuit was filed and at the time they
10 registered to vote.

11 THE COURT: So that's a "yes." All right.

12 MR. KLEMENTOWICZ: Yes.

13 THE COURT: What else are they supposed to
14 define? Let me try it this way. Don't your clients
15 also maintain residency in other states as defined
16 by those other states?

17 MR. KLEMENTOWICZ: I don't know.

18 THE COURT: Okay. But certainly as defined by
19 our state. All right.

20 MR. KLEMENTOWICZ: I don't know. And I don't
21 know whether they would be able to maintain
22 residency in another state under 1264 now that
23 they -- resident and domicile are the same because
24 they have claimed domicile in New Hampshire. So
25 there's an argument to be made that that

1 automatically makes them residents of New Hampshire
2 which vacates their claim of residency in another
3 state.

4 THE COURT: By registering to vote or by
5 registering a car and getting a license?

6 MR. KLEMENTOWICZ: By registering to vote and
7 then July 1, 2019, making 1264 operative.

8 THE COURT: I didn't understand that. What do
9 you mean?

10 MR. KLEMENTOWICZ: July 1, 2019, is when --

11 THE COURT: The effective date.

12 MR. KLEMENTOWICZ: Yes. And that was the date
13 that the definition of residence became the
14 definition of domicile. So they had been
15 domiciliaries then by operation of law.

16 THE COURT: They're residents.

17 MR. KLEMENTOWICZ: Yes.

18 THE COURT: All right. Mr. Zoracki, you wanted
19 to say something?

20 MR. ZORACKI: Yes. Just very briefly. I think
21 this is clear based on the prior discussion, but in
22 response to some of the things that Attorney Spencer
23 had mentioned. There are obviously two separate
24 statutes. We have domicile in RSA 654:1 is what
25 controls the voting. And if I may just briefly?

1 THE COURT: Wait a minute. Say that again.

2 MR. ZORACKI: Domicile. The definition of
3 domicile in RSA 654:1 that controls whether or not a
4 person can vote in New Hampshire.

5 THE COURT: All right.

6 MR. ZORACKI: And that's the word used
7 throughout the election statutes.

8 THE COURT: But to register to vote, one must
9 declare oneself a resident, which is the same as --
10 now the same as a domiciliary, right?

11 MR. ZORACKI: That's right, yes. And if I may
12 just briefly respond? I was planning to rest my
13 papers with respect to the 24th Amendment poll tax
14 claim. "The poll tax is a broad-based levy imposed
15 on persons as a condition of obtaining a ballot."
16 That's not what we have here. There's no
17 requirement that a voter demonstrate that the fees
18 that we're talking about have been paid as a
19 condition of obtaining a ballot. And if this were
20 construed as a poll tax, that would lead to
21 illogical results. So the driver's license fees and
22 the car registration fees that most residents of New
23 Hampshire pay would not be considered a poll tax,
24 but with respect to this class of voters that are
25 affected by -- allegedly affected by HB 1264, that

1 would be a poll tax. Our position is that's just an
2 illogical result and doesn't support a 24th
3 Amendment claim.

4 THE COURT: Let me ask you this. Can be
5 anybody. Let me ask you this. I'm going to ask
6 both sides. Can someone be a resident -- as of July
7 1, under 21:6. Can somebody be a resident of New
8 Hampshire and a resident of another state?

9 MR. GALDIERI: That's an interesting question,
10 Your Honor. I think --

11 THE COURT: If so, when?

12 MR. GALDIERI: I believe that the intent would
13 be that no, they can't, but 654:1 does contain a
14 definition, different definition, perhaps, than RSA
15 21:6. And when somebody registers to vote, they
16 swear that they're domiciled in the state consistent
17 with RSA 654:1, not with RSA 21:6. But those
18 definitions, though they might sound different, in
19 practical application appear now to equate.

20 THE COURT: I take that as a "no," one may not
21 be a resident of another -- there's no certainty as
22 to -- for one to be a resident of another state and
23 a resident of New Hampshire under 21:6.

24 MR. GALDIERI: I believe that is certainly the
25 intent of the 12 -- 1264.

1 THE COURT: That sounds -- respectfully, it
2 sounds like a dodge. Whether it's the intent,
3 what's the law? Can one be -- when and under what
4 circumstances can one be a resident of New Hampshire
5 after July 1, with the definition under 21:6, and a
6 resident of another state?

7 MR. GALDIERI: I don't think they can under
8 21:6.

9 THE COURT: All right. You agree?

10 MR. KLEMENTOWICZ: I hadn't thought that much
11 about this, but I think that that's probably true
12 under RSA 21:6. I don't know if another state would
13 allow people to be residents of another state and
14 New Hampshire, but it does look like New Hampshire
15 doesn't allow someone to be a resident of another
16 state as well.

17 THE COURT: All right. Mr. Garland,
18 Mr. Galdieri, are there any cases -- drawing the
19 distinction you've made between different
20 departments of the government and redressability and
21 as it pertains to same, is there any authority for
22 this idea of delineating compartmentalizing
23 different state functions, different state agencies
24 that you've asked me to sort of countenance in an
25 order dismissing Mr. Gardener? I'm not aware of it,

1 but if there is some, direct me to it, please.

2 MR. GARLAND: Your Honor, I'm having trouble
3 finding it. I'm sorry about that. There were at
4 least two cases that we cited in the initial brief
5 in this motion.

6 THE COURT: Are you talking about -- let me see
7 here. Baylor versus Lombardi or Duit Construction
8 versus Bennett? Those seem to be like private
9 actors. I'm not sure.

10 MR. GARLAND: I believe -- I'm sorry, Your
11 Honor. I didn't read these this morning and I
12 really should have. But my understanding, subject
13 to correcting the record if I'm wrong, is that those
14 cases focused, or the least one of those cases
15 focused on the fact that they basically sued the
16 wrong governmental entity, that this governmental
17 entity doesn't enforce the law in question, and
18 therefore, he didn't have standing to bring a claim
19 against that governmental entity.

20 Again, I didn't read them this morning, so
21 subject to that caveat.

22 THE COURT: Okay. What can you tell me now, if
23 anything -- and I realize it might be nothing --
24 about the way in which the State of New Hampshire
25 enforces licensure and auto registration? Because

1 I'm still trying to get to -- and I honestly think
2 this isn't the big picture. I think this analysis
3 inures to your favor. I'm trying to see what way --
4 not for standing, because I do think there's
5 potentially information sharing between departments
6 and I think that helps confirm standing in general
7 and it confirms standing as against the Secretary of
8 State's office. But big picture I'm sort of
9 thinking now.

10 I'm trying to understand how this works. And
11 maybe I've been told how it works. The theory is
12 not what's going to happen on the roads. The theory
13 is what's going to happen in the minds of college
14 students who want to vote.

15 But getting back to the roads, because that's
16 where the burdens really are, or at least some of
17 the burdens are. Do you have any real understanding
18 or way you can explain about how these laws are
19 enforced now by DMV, licensure and auto
20 registration, and how that might change under the
21 new statutory regime?

22 MR. GALDIERI: I don't believe we have a clear
23 picture. My understanding of that is for their
24 purposes, not much has changed. I think,
25 practically speaking, what we see is before HB 1264,

1 there's a -- part of the definition stated to be a
2 resident you've got to be here for the indefinite --
3 manifest an intent to be here for an indefinite
4 future, and that was the part that was struck down
5 in Newburger.

6 I think if we go back in time, what you'll find
7 is that the Department of Motor Vehicles is not
8 denying anyone a license because they come in when
9 they're 16, but say, you know, "When I'm 80 years
10 old I'm going to retire and go to Florida."

11 So practically speaking, I'm not sure they were
12 granting or denying licenses based on the indefinite
13 future language that's been removed. And
14 practically speaking, when you're out on the road, I
15 think this provision is ultimately enforced very
16 little --

17 THE COURT: If at all.

18 MR. GALDIERI: -- if at all. It would have to
19 be a very unique constellation of circumstances.

20 THE COURT: For the new regime to be
21 enforced.

22 MR. GALDIERI: Right. To even bring a
23 violation to the light.

24 THE COURT: I mean, it's not infrequent that
25 people are cited for driving without a license or

1 driving an unregistered vehicle. The question is,
2 is a person driving an out-of-state tagged vehicle
3 or with an out-of-state license could ever
4 eventually be prosecuted for being a resident or a
5 domicile here, yet having documents on the vehicle
6 and on the license that are from a different
7 jurisdiction. It just -- that just seems to be very
8 unlikely.

9 MR. GALDIERI: Right, because they're still
10 nonresident drivers within the state. And the motor
11 vehicle code even has a provision in it that
12 predates 1264 that if you're a nonresident driver
13 and you're here with a motor vehicle for more than
14 six months, you have to go get a license from the
15 DMV, so --

16 THE COURT: Evidence of having registered to
17 vote, though, might be admissible in that trial,
18 although I don't think there could be a penalty
19 assessed for having voted, unless you did it in a
20 very -- unless you draw the chain of inferences.

21 MR. GALDIERI: Correct.

22 THE COURT: You vote here. You have the wrong
23 documents. That's not really the way the law would
24 work. I'm just trying to play it out.

25 MR. GALDIERI: And it wouldn't be definitive

1 evidence either, because somebody could register to
2 vote and before they would have to get a license,
3 say, you know, I'm -- "In 30 more days, I'm going --
4 I've now got a job in Wisconsin and I'm going to be
5 moving there. I don't consider myself to be a
6 resident of the State of New Hampshire anymore," and
7 ultimately change their status because that's
8 ultimately it's vested within them to change their
9 status, and move to Wisconsin and never get a
10 driver's license here, but have registered and have
11 voted here.

12 THE COURT: I get it. I give you the last word
13 if you want it.

14 MR. KLEMENTOWICZ: No, but I do have a timing
15 issue that I'd like to discuss.

16 THE COURT: Like a procedural issue?

17 MR. KLEMENTOWICZ: Yes.

18 THE COURT: Me, too. I'm going to -- we don't
19 need to do that on the record now. I'm going to --
20 we've been going a long time here. Let me give her
21 a break. We're off the record.

22 (Discussion off record.)

23 (Whereupon, the motion hearing was concluded at
24 12:13 p.m.)
25

C E R T I F I C A T E

I, Sharon G. Saalfeld, a Licensed Shorthand Reporter for the State of New Hampshire, Certified Shorthand Reporter for the Commonwealth of Massachusetts, Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceeding taken at the place and on the date hereinbefore set forth to the best of my skill and ability under the conditions present at the time.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken, and further that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

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